
570 Lexington Avenue, 8th Floor
New York
New York 10022
USA

T +1 646.625.4000
F +1 646.625.4044

www.kennedyslaw.com

Christopher.Carroll@kennedyscmk.com

April 29, 2019

Via Hand Delivery

The Honorable Andrea Masley
Supreme Court of New York
Part 48, Courtroom 242
60 Centre Street
New York, New York 10007

Re: **Alterra America Insurance Co. v. National Football League, et. al.**
Index No.: 652813/2012E

Discover Property & Cas. Co., et al. v. National Football League, et. al.
Index No.: 652933/2012E

Dear Justice Masley:

Please accept this letter on behalf of the Insurers¹ in response to the Non-Party Teams² application for a Temporary Restraining Order (“TRO”). The Non-Party Teams seek to temporarily enjoin the Insurers from proceeding with motions to compel compliance with subpoenas that the Insurers validly issued to the Non-Party Teams in their home jurisdictions until this Court rules upon their motion for a protective order (the substance of which will be addressed by the Insurers in a separate memorandum of law in due course). The Non-Party Teams cannot meet the standard for the extraordinary relief that they seek.

Over 20 months ago, the Insurers began issuing valid state-issued subpoenas for documents to each of the 32 NFL member teams from each team’s home state court.³ After several meet and confer telephone conferences and letters regarding the Non-Party Teams’ failure to produce documents, the Insurers and Non-Party Teams were at an impasse. Given the delay and the fact that most teams have failed to produce ANY documents whatsoever (and the minority of teams produced a few, mostly insurance and other ministerial documents), the Insurers began filing motions to compel in each of the states from which the subpoenas issued. The Non-Party Teams now cry foul and come to this Court seeking the extraordinary—and baseless—relief of a TRO.

¹ TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, Westport Insurance Corporation, and Allstate Insurance Company, solely as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company.

² The “Non-Party Teams” are the 32 individual and separately incorporated teams of the National Football League.

³ 25 of the 32 Non-Party Teams were served with such a subpoena by October **2017**. The last team was served over 8 months ago.

I. The Legal Standard.

Preliminary injunctive relief pursuant to CPLR 6301 may only be granted if the movant can demonstrate, with actual evidence and not conclusory assertions: “(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in his favor”. See J.A. Preston Corp. v. Fabrication Enterprises Inc., 68 N.Y.2d 397, 406 (1986); Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep’t 2001) (“Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.”); see also CPLR 6312(a). If the movant fails to meet its burden to establish each and every one of these elements, the request for injunctive relief must be denied. See, e.g., Doe v. Axelrod, 73 N.Y.2d 748, 750-51 (1988) (denying request for a preliminary injunction where the likelihood of success on the merits prong was not met); Little India Stores, Inc. v. Singh, 101 A.D.2d 727, 728 (1st Dep’t 1984) (“In the absence of a clear right to the relief demanded, injunctive relief should not be granted until the issues have been fully explored and the entire matter resolved after plenary trial.”). Thus, the unique relief of a TRO must be used cautiously and only in accordance with appropriate procedural safeguards. See Uniformed Firefighters Assoc. v. New York, 79 N.Y.2d 236 (1992).

Here, the Non-Party Teams completely fail to establish 1) immediate and irreparable harm that will befall them (collectively or individually); 2) a likelihood of success on the merits of their motion for a protective order; and 3) that equity weighs in their favor.⁴ Accordingly, the request for a TRO should be denied and this Court should set a schedule for briefing and argument on the motion for a protective order.

II. The Non-Party Teams Will Not Sustain Immediate and Irreparable Harm

As noted, the extreme relief of a TRO may only be granted after *all three* elements are satisfied by clear evidence. Thus, it is well settled that not mere prejudice or inconvenience, but rather, “*irreparable harm*” is a threshold requirement for preliminary injunctive relief and, absent a showing that the movant will imminently suffer such irreparable harm, a preliminary injunction cannot be granted. See Haulage Enters. Corp. v. Hempstead Res. Recovery Corp., 426 N.Y.S.2d 52, 54 (2d Dep’t 1980) (reversing the granting of preliminary injunction where movant failed to establish irreparable injury, without addressing likelihood of success on the merits or a balancing of the equities); Chicago Research & Trading v. N.Y. Futures Exch., Inc., 446 N.Y.S.2d 280, 282 (1st Dep’t 1982) (“Injunctive relief will be afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury.”). Accordingly, such relief may be granted pursuant to CPLR § 6301 only where immediate and irreparable injury, loss or damage will result unless the non-moving party is restrained before a hearing can be had. See CPLR § 6313.

There is no evidence of any harm, let alone any *irreparable* harm, that will come to the individual Non-Party Teams if individual motions pending against them in their

⁴ The failure of this third prong is particularly evident given that after more than 18 months of stalling most of the teams have failed to produce a single document.

individual home jurisdictions (where **they** demanded the Insurers pursue motions against them in the first place) are not immediately enjoined pending resolution of their application for a protective order in this case.⁵ Indeed, the 32 Non-Party Teams, which are separate corporate entities domiciled in separate jurisdictions, rest their contention that they - collectively, as a group - are facing irreparable harm on a statement that such harm will occur, apparently between now and when their application for a protective order is addressed, due to them “having to litigate identical discovery issues in 32 separate court proceedings in 22 different states.” Moving Br. at 7. Importantly, however, there is no single entity called the “Non-Party Teams” that could even sustain such alleged harm. The “Non-Party Teams” is not a jural entity. **No** team that received a subpoena and is now the subject of motion practice for its failure to properly comply with the subpoena that it received will have to litigate anything in any court other than its home court. Moreover, there is no evidence that the disposition of any motion seeking to compel a particular team to simply comply with a subpoena would result in any harm to that particular, or any other, team. Indeed, the application for the TRO is not supported by a single client affidavit from an actual employee of any one of the 32 Non-Party Teams even purporting to describe any irreparable harm, as it properly should be. See, e.g., Welsh-Ovcharov v Stein, 2017 WL 6450547 (N.Y. Sup. Ct. Dec. 18, 2017). No harm - let alone irreparable harm - will result from any team having to face a single motion to compel in the home state in which it is domiciled.

Importantly, the current unitary application the Non-Party Teams have made to this Court is quite amazing considering that when the Insurers attempted to meet and confer with them collectively about their individually deficient responses to the Insurers’ subpoenas, the Non-Party Clubs insisted that motion practice in each team’s home jurisdiction was **required** and was **their preference**. Specifically, when the Insurers wrote to the Non-Party Teams’ single counsel about various issues which they believed in good faith could be addressed collectively (at that time), first and foremost among the Non-Party Teams’ numerous objections to those efforts was the following:

It is important to note that the 32 Non-Member [Teams] reside in 22 different states, each with their own discovery rules and laws that are individually applicable to the Subpoenas. The manner in which certain states view non-party discovery varies widely and the Non-Party Clubs intend to take full advantage of those laws in the event they are subject to motion practice.”

See Ex. A attached herewith (October 11, 2018 letter from Proskauer Rose to the Insurers) at page 3.

Now that the Non-Party Teams’ refusal to comply with the subpoenas has necessitated that very motion practice, the Non-Party Teams would have this Court believe that availing themselves of the jurisdictions that they insisted were appropriate would somehow constitute irreparable harm. This is nonsense. The Non-Party Teams cannot have it both ways (indeed the only consistency in their position has been to make it as difficult as possible

⁵ Respectfully, the issue of whether this Court possess the jurisdiction to halt proceedings against non-parties to this case in foreign jurisdictions will be addressed in the Insurers’ substantive opposition to the Non-Party Teams’ Order to Show Cause.

for the Insurers to gain access to documents and make it as easy as possible for the Non-Party Teams to resist production).

Each Non-Party Team was served with a duly issued subpoena in its home jurisdiction (the “Subpoenas”).⁶ The vast majority of the Subpoenas were issued and served well over a year ago, and *all* of them were served at least 8 months ago. This process was delayed considerably to the extent that where commissions were needed to issue a subpoena in a particular jurisdiction, the Insurers were forced to bring orders to show cause before this Court to obtain such commissions due to the refusal of the NFL (the league in which all the teams are members) to stipulate to their issuance, despite not actually opposing the orders to show cause. Having unabashedly failed to comply with their obligations under the Subpoenas, the Non-Party Teams forced the Insurers to seek court intervention. The Insurers properly did so in the jurisdictions in which the relevant Subpoenas were issued (i.e., the various courts that the Non-Party Teams previously stated they intended to “take full advantage of”). Now, after the Insurers were forced to comply with all the jurisdictional hurdles to issue and serve valid subpoenas and motions to compel on each foreign, Non-Party Team, counsel for the collective teams complains that they should not be required to respond in like fashion. The collective strategy of delay and refusal to produce relevant and necessary discovery should not be countenanced any more.

It defies logic to contend, for example, that the Philadelphia Eagles would be “irreparably harmed” by having to respond to a motion to compel a subpoena filed against them in Philadelphia because the Tampa Bay Buccaneers must separately respond to a motion to compel in their own backyard in Florida. Each Non-Party Team is called upon to respond to only *one* motion to compel, in its home jurisdiction where the relevant Subpoena was issued.

Critically, then, it is not the “Non-Party Teams” that are being forced to litigate numerous discovery disputes in various states. Indeed, to allow each Non-Party Teams the opportunity to “take full advantage of” the laws of each of their home jurisdictions, irrespective of the separate rights of their brethren, is exactly what the Non-Party Teams said they wanted more than six months ago. Unquestionably, it is only the law firm of Proskauer Rose that has any potential burden here. The Non-Party Teams opted to retain the same law firm to represent them in response to all of the Subpoenas in numerous jurisdictions throughout the country. And while that may present certain logistical issues for Proskauer Rose (albeit that responding is certainly within its resources and capacity to handle), the teams’ voluntary choice of counsel cannot constitute “immediate and irreparable harm” to any one (or all) of the Non-Party Teams. Each of the Non-Party Teams is a sophisticated corporation worth more than \$1 billion, and surely has the ability to respond to a single subpoena and/or motion to compel, especially in its home state.

Aside from the non-existent burden that the Non-Party Teams claim, the only other form of alleged irreparable harm is the potential for the motions to compel compliance with the Subpoenas in various states to result in inconsistent rulings. First, as noted above, to have any disputes arising out of the Subpoenas litigated in their home states has long been the stated preference of the Non-Party Teams. Second, it is totally legitimate to compel a non-party to comply with a subpoena through the court that issued the subpoena as the

Insurers are doing here. Indeed, it is common practice and perfectly appropriate to sue a corporation in its home jurisdiction and apply the law of that jurisdiction to discovery issues arising from that suit (or subpoena). To suggest (as the Non-Party Teams do) that this acceptable method of pursuing discovery from foreign, non-party entities is some type of “strategy” or means of forum shopping to avoid litigating in the main lawsuit is simply illogical. Rather, the only “strategy” at play is the NFL’s and the Non-Party Teams’ continued effort to delay and forestall production of relevant and necessary discovery. Third, there is no risk of inconsistency due to having each team comply with its own states’ rules for production, logging and privilege. Each team will have to comply only with one court’s ruling from its own state.

To put it plainly, the Insurers have done everything that the Non-Party Teams asked of them and the law requires. There is no conceivable irreparable harm that can come from each of the Non-Party Teams having to respond to, frankly, very common and straightforward discovery demands in their jurisdictions, which they have more than enough resources to muster doing. Accordingly, the Non-Party Teams fail to satisfy the threshold requirement of proving irreparable harm, which is dispositive of this analysis. As such, this Court should deny the Non-Party Team’s application for a TRO, in its entirety.

III. The Non-Party Teams Are Not Likely to Succeed on the Merits

Even assuming, *arguendo*, that the Non-Party Teams could hypothetically establish some type of irreparable harm (which they cannot), they would still need to satisfy the remaining two prongs of the test for preliminary injunctive relief under CPLR 6301. Under the second prong, the Non-Party Teams must establish that they are likely to convince this Court in their motion for protective order to (1) direct the Insurers to withdraw or stay any discovery proceedings that they have commenced against any of the Non-Party Teams; (2) direct the Insurers not to commence any more proceedings against the Non-Party Teams; and (3) consolidate all such proceedings before this Court. They fail to satisfy this prong, as well.

The Non-Party Teams contend that the relief they are seeking should be granted specifically because New York *federal courts* routinely require parties to litigate discovery disputes in the forum where the main action is located given that court’s familiarity with the issues and the need for that federal court to manage its docket. Moving Br. at 6 (citing four *federal* cases where this occurred).⁷ The reason this happens in *federal courts* (including in all of the cases cited by the Non-Party Teams) is because, obviously, all federal courts are governed by a single set of rules, the Federal Rules of Civil Procedure, and Rule 45(f) provides an explicit mechanism for the transfer of motions for compliance with subpoenas to the main federal action. Of course, there is no such common legal regime shared among the state courts of this country. And, certainly no such rule exists under New York’s CPLR that requires, for example, the North Carolina Superior Court in Mecklenburg County to transfer the Insurers’ motion to compel the Carolina Panthers’ compliance with a subpoena issued by that county’s offices to the New York Commercial Division for the sake

⁷ Notably, the Non-Member Team cite four cases where a New York federal court transferred a motion to enforce a subpoena to a different court. No case is cited where any New York court reached into the jurisdiction of some other court and transferred such a motion from that court to itself.

of preserving resources or ensuring consistency among rulings. Not to mention, this manufactured theory about the ability to transfer matters from foreign states to the New York Commercial Division under New York state jurisprudence belies the Non-Party Teams' initial stated notion that they would avail themselves of each of the teams' respective home jurisdictions.

Moreover, the Non-Party Teams contend that because the Insurers are seeking the same general categories of documents from the various teams (which are each asserting virtually the same objections), all of the Insurers' separate motions to compel compliance with the various Subpoenas should be adjudicated before this Court to avoid inconsistent rulings. See Moving Brief at pg. 9-10. Without providing any explanation as to why separate potential rulings is problematic for the separate teams or why it is (all of a sudden) unwise for the various foreign jurisdictions to be permitted to enforce the subpoenas that they issued, the Non-Party Teams' essential argument is a plea for this Court to make the process of responding to the Insurers' motions as simplified and convenient as possible for the Non-Party Teams' attorneys at Proskauer Rose. This is not a valid reason to grant the Non-Party Teams' motion for protective order, especially in the context of the Non-Party Teams forcing the Insurers to pursue the foreign Subpoenas and seek compliance through numerous separate proceedings that the Non-Party Teams supposedly wanted in the first place. They cannot have it both ways. As such, there is no sound basis for granting the Non-Party Teams' motion for protective order, and the second prong of the test for establishing a need for a TRO is not satisfied.

IV. The Equities Weigh in Favor of the Insurers

The Non-Party Teams also fail to satisfy the last prong of the test for a TRO, because they cannot prove that any equities weigh in their favor. As explained above, the Insurers served Subpoenas on each of the Non-Party Teams between 8 and 20 months ago. The Insurers have been incredibly patient with the Non-Party Teams in responding to the Subpoenas, giving them each extra time to provide their initial responses and agreeing to participate in extensive "meet and confer" efforts over the course of the last year-and-a-half. Since the first round of Subpoenas were served in August 2017, the Insurers have received a grand total of 189 documents from 14 of the 32 Non-Party Teams. All of the documents produced by these Non-Party Teams consist solely of insurance policy documents. The remaining 18 Non-Party Teams have produced *nothing*.

Despite the Non-Party Teams' sudden desire to discuss a plan for resolving the disputes arising from the Subpoenas, it is clear that the Non-Party Teams did not intend to make any serious effort to respond to the Subpoenas until the Insurers were forced to pursue necessary court action at significant costs to themselves. Now that the Insurers have taken those actions, the Non-Party Teams seek to retread old ground that should have been the subject of meet and confer efforts many months, if not a year, ago. The Non-Party Teams failed to produce a single responsive document other than insurance policies (from less than half of them) and, therefore, the equities rest in favor of the Insurers. There is no stated reason why the Non-Party Teams are not obligated to comply with the Subpoenas.

The Honorable Andrea Masley
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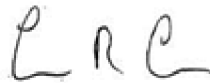
V. Conclusion

For all of the foregoing reasons, the Insurers respectfully request that the Court deny the Non-Party Teams' application for a temporary restraining order.

We look forward to discussing this matter with the Court.

Respectfully Submitted,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CRC', is positioned above the typed name of Christopher Carroll.

Christopher Carroll
Partner
For Kennedys CMK

cc: All Counsel of Record (via email)
John E. Failla (via email)
Seth B. Schafler (via email)
Steven H. Holinstat (via email)